LIM TZE SIAN v. COVERRIGHT SURFACE MALAYSIA SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
IDRUS HARUN JCA
MARY LIM JCA
[CIVIL APPEAL NO: B-03(IM)(NCVC)-102-11-2015]
28 NOVEMBER 2016

CONTRACT: *Damages – Assessment – Claim for outstanding salary – Counterclaim – Loss of profit for misusing business information and confidential information – Non-attendance of appellant – Interlocutory judgment – Assessment of damages by Senior Assistant Registrar ('SAR') – Damages affirmed by High Court – Whether quantum claimed properly proved – Whether both SAR and High Court Judge erred in not allowing for calling of witnesses during assessment of damages*

The appellant had informed the respondent of his intention to resign from employment. However, the respondent had terminated the appellant's service before the appellant's resignation. The appellant, therefore, initiated an action against the respondent and sought to recover his outstanding salary from the respondent. The respondent, however, counterclaimed for a sum of RM1 million representing the respondent's loss suffered as a result of the appellant's wrongful act of disclosing and misusing the respondent's business, confidential and intellectual property information. The appellant's action was struck out due to his repeated non-attendance. Interlocutory judgment was entered for the respondent's counterclaim and damages were ordered to be assessed by the Senior Assistant Registrar ('the SAR'). The SAR assessed a sum of RM1 million representing the respondent's loss of profit. On appeal, the award of the SAR was affirmed by the High Court Judge ('HCJ'). Aggrieved, the appellant filed the present appeal on the grounds, *inter alia*, that (i) both the SAR and the HCJ erred in not allowing for the calling of witnesses during the assessment of damages; and (ii) the respondent did not in fact properly prove the quantum claimed.

Held (allowing appeal with costs)
Per Mary Lim JCA delivering the judgment of the court:

(1) While the appellant's liability to pay was a non-issue by reason of the interlocutory judgment, his liability to pay for any damage and any amount reflective of that damage, is still subject to proof. In this instance, what the SAR had done was effectively accept and treat the order on liability to pay as good or effective on the issue of the appellant's liability to pay the amount claimed by the respondent. Nowhere in the grounds of the SAR's decisions was there any indication of a real evaluation of the evidence. Had that been done, it would be

seen that the burden of proving loss was never discharged by the respondent. Had the learned SAR realised the correct position in law and, what was required in terms of evidence, the order for general damages would never have been allowed. (paras 21 & 22)

(2) Section 74 of the Contracts Act 1950 requires the respondent to prove that it had suffered loss of profits as a result of the appellant's breach of the confidentiality and non-competition agreement. The respondent must prove that this loss of profit arose naturally in the usual course of things from such breach. If this loss is too remote or is an indirect loss, the respondent is not entitled to any compensation, and the court must dismiss the claim, or order nominal damages, even if interlocutory judgment has already been entered. On the facts of the case, the respondent cannot be said to have proved its loss and was therefore, not entitled to any compensation, including a claim for loss of profits. (paras 30 & 36)

(3) There was no evidence that the respondent had always enjoyed an increase in its revenue or its profits; that but for the appellant's acts, this trend would have continued. Evidence showed that the respondent was already experiencing a reduction in revenue collection prior to the period complained of. This alone showed that the respondent's claim of a loss of profits was clearly unsustainable. (paras 38 & 40)

(4) Since the respondent had chosen to rely on the affidavit evidence, the SAR was required to scrutinise such evidence to see if the claim of damage was indeed proved. On the facts, there was no such examination by the SAR. If there had been one, it would have been readily apparent that the respondent's claim was not supported by the documents relied upon. The failure on the part of the SAR was not appreciated by the High Court Judge. As such, appellate intervention was warranted. (para 47)

Bahasa Malaysia *Headnotes*

Perayu telah memaklumkan kepada responden niatnya untuk meletak jawatan. Walau bagaimanapun, responden telah menamatkan perkhidmatan perayu sebelum perletakan jawatan perayu. Oleh itu, perayu memulakan tindakan terhadap responden dan menuntut gaji tertunggak dari responden. Responden bagaimanapun menuntut balas untuk jumlah RM1 juta bagi kerugian yang dialami oleh responden akibat perbuatan salah perayu mendedah dan menyalahguna maklumat perniagaan, harta intelektual dan rahsia responden. Tindakan perayu telah dibatalkan akibat ketidakhadiran perayu berulang kali dan penghakiman interlokutori telah dimasukkan untuk tuntutan balas responden dan ganti rugi diarahkan untuk ditafsir oleh Penolong Kanan Pendaftar ('PKP'). PKP telah mentaksir sejumlah RM1 juta sebagai kerugian keuntungan responden. Atas rayuan, award SAR telah disahkan oleh Hakim Mahkamah Tinggi. Terkilan, perayu memfailkan

rayuan ini atas alasan, antara lain, bahawa (i) kedua-dua PKP dan Hakim Mahkamah Tinggi terkhilaf kerana tidak membenarkan panggilan saksi semasa pentaksiran ganti rugi; dan (ii) responden tidak membuktikan dengan sewajarnya kuantum yang dituntut.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Oleh kerana liabiliti perayu untuk membayar tidak menjadi suatu isu disebabkan penghakiman interlokutori, tanggungannya untuk membayar apa-apa ganti rugi dan apa-apa jumlah yang mencerminkan ganti rugi tersebut, masih tertakluk kepada keterangan. Dalam hal ini, apa yang dilakukan oleh SAR adalah untuk menerima perintah liabiliti untuk membayar sebagai berkesan mengenai isu liabiliti untuk perayu membayar jumlah yang dituntut oleh responden. Tidak ada apa-apa dalam alasan keputusan SAR mengenai penilaian sebenar keterangan. Jika ini dilakukan, ia boleh dilihat bahawa beban membuktikan kerugian tidak pernah dilepaskan oleh responden. Jika SAR menyedari kedudukan betul dalam undang-undang dan, apa yang diperlukan dari segi keterangan, perintah ganti rugi am tidak akan dibenarkan.

(2) Seksyen 74 Akta Kontrak 1950 memerlukan responden membuktikan bahawa dia telah mengalami kerugian keuntungan akibat kemungkiran perayu terhadap perjanjian kerahsiaan dan ketidaksaingan tersebut. Responden harus membuktikan bahawa kerugian keuntungan ini timbul secara semula jadi dalam perjalanan biasa dari kemungkiran tersebut. Jika kerugian ini terlalu terasing atau kerugian tidak langsung, responden tidak berhak kepada apa-apa pampasan, dan mahkamah harus menolak tuntutan responden, atau memerintahkan ganti rugi nominal walaupun penghakiman interlokutori telah dimasukkan. Mengikut fakta kes, responden tidak boleh dikatakan telah membuktikan kerugiannya dan oleh itu, tidak layak mendapat apa-apa pampasan, termasuk tuntutan kehilangan keuntungan.

(3) Tidak ada keterangan bahawa responden sentiasa menikmati peningkatan pendapatan atau keuntungan; tetapi oleh kerana perbuatan perayu, trend ini akan berterusan. Keterangan menunjukkan bahawa responden sudah pun mengalami pengurangan keuntungan sebelum tempoh yang diadukan tersebut. Ini menunjukkan bahawa tuntutan responden untuk kehilangan keuntungan adalah jelas tidak mapan.

(4) Oleh kerana responden telah memilih untuk bergantung kepada keterangan afidavit, SAR diperlukan untuk meneliti keterangan tersebut untuk melihat sama ada tuntutan ganti rugi sememangya dibuktikan. Berdasarkan fakta, tidak ada penilaian sedemikian dilakukan oleh SAR. Jika ini dilakukan, akan menjadi jelas bahawa tuntutan responden tidak

disokong dengan dokumen yang disandar. Kegagalan pihak SAR tidak dipertimbangkan oleh Hakim Mahkamah Tinggi. Oleh itu, campur tangan rayuan adalah wajar.

Case(s) referred to:
Bonham-Carter v. Hyde Park Hotel Ltd (1948) 65 TLR 177 ***(refd)***
Parkson Corporation Sdn Bhd v. Fazarudin Ibrahim [2002] 4 CLJ 18 CA ***(refd)***
SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(refd)***
Taiping Poly (M) Sdn Bhd v. Wong Fook Toh & Ors [2011] 3 CLJ 837 FC ***(refd)***
Tan Ah Chio & Ors v. Lua Kim Son & Ors [2014] 1 LNS 1004 CA ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 74
Rules of Court 2012, O. 34, O. 35, O. 37 r. 1(1), (5), O. 41

For the appellant - SK Liow; M/s Liow & Co
For the respondent - K Jeyaraj & Alan Selvandaran; M/s K Jeyaraj Fadhli Sin

[Editor's note: For the High Court judgment, please see Lim Tze Sian v. Coveright Surface Malaysia Sdn Bhd [2015] 1 LNS 1369 (overruled).]

Reported by Sandra Gabriel

JUDGMENT

Mary Lim JCA:

[1] The present appeal relates to a claim that was initiated by the appellant. The appellant sought to recover his outstanding salary and allowance totalling RM7,400 from the respondent, his employer, in the Magistrate's Court at Klang. The respondent is in the business of manufacturing and selling specially printed lamination paper. By letter dated 1 October 2010, the appellant had informed the respondent that he intended to resign with effect March 2011. However, by letter dated 21 January 2011, the respondent terminated the appellant's employment.

[2] In its defence and counterclaim, the respondent counterclaimed for *inter alia* a sum of RM1 million representing the respondent's loss suffered as a result of the appellant's wrongful act of disclosing and misusing the respondent's business information and, confidential and intellectual property information. Because of the quantum of damages claimed, the suit was transferred to the High Court at Shah Alam.

[3] At the High Court, the appellant's action was, however, struck out due to his repeated non-attendance. Interlocutory judgment was entered for the respondent's counterclaim and damages were ordered to be assessed by the Senior Assistant Registrar (the SAR).

[4] The learned SAR conducted the assessment based on affidavits filed by both parties. There was no cross-examination of the deponents of the affidavits. The learned SAR assessed a sum of RM1 million as representing the respondent's loss of profit and, issued a certificate to that effect. According to the learned SAR, he had taken the evidence of the respondent's losses as shown in the exhibits in arriving at that sum. The significant losses shown in exhs. WPC6, WPC7 and WPC8 are clearly due to the appellant's use of the respondent's confidential information and "trade secrets", that the appellant had disclosed confidential information on the respondent's customers to Siam Paper Décor.

[5] On appeal, this award was affirmed by the learned High Court Judge. The learned judge found that the sole issue was whether the respondent had proved damages amounting to RM1 million since the issue of liability had already been decided by the judgment in default entered earlier when the appellant failed to attend court. Her Ladyship found that there were no merits in the appeal, that the learned SAR was "correct and justified in making the decision" and that the appellant had failed to adduce and rebut the documentary evidence in relation to the respondent's losses. The appellant's affidavit contained only "bare denials …" Consequently, the appeal was dismissed with costs of RM5,000 to the respondent.

[6] After hearing the oral submissions of learned counsel and having considered the written submissions and record of appeal, we were unanimous in allowing the appeal. We agreed with the submissions of the appellant's counsel that the respondent had failed to prove the losses suffered and had further failed to prove that the losses suffered were indeed attributable to the acts of the appellant. The element of causation was still relevant in relation to the assessment of damage, that the respondent had to prove that the particular damage or loss claimed was caused by or attributable to the appellant. Since the respondent failed to do that, the issue of rebuttal by the appellant did not arise. None of these relevant and critical matters was addressed by the SAR or the learned judge. This failure rendered the decision reached unjust and wrong in law, and it must be corrected. The appeal was consequently allowed with costs of RM15,000 to the appellant subject to the payment of allocator fee.

Reasons For Our Decision

[7] Two main grounds were raised by the appellant in this appeal: (i) that both the learned SAR and the High Court erred in not allowing for the calling of witnesses during the assessment of damages; and (ii) that the respondent did not in fact properly prove the quantum claimed. These were the same grounds relied on at the High Court. In order to determine if there is basis in any of these grounds, it would be best to start with the orders that were pronounced.

[8] At a case management of the action on 1 October 2012, interlocutory judgment in respect of the respondent's counterclaim was entered. A copy of that order appears at pp. 16 and 17 of the record of appeal. Although it does not contain the terms "interlocutory judgment", in effect and substance, it is precisely that. There was no appeal against this order.

[9] According to the terms of the order, the court first struck out the appellant's claim. The following orders were then entered in relation to the respondent's counterclaim. Aside from the order that general damages be assessed, the High Court ordered that the appellant do furnish the defendant details of profits and commissions which were received directly or indirectly by the appellant or the appellant's agents, servants or relatives, from third parties in particular Landecor Panel Sdn Bhd and 3R Woodtech Sdn Bhd arising from disclosure of the respondent's information. The court also prohibited the appellant from divulging or disclosing any of the respondent's personal data and intellectual property; and that the appellant be restrained from being involved in any activities which compete with those of the respondent for a period of 24 months from the date of his resignation from the respondent's employment.

[10] When the information ordered was not forthcoming from the appellant, the respondent decided to issue a notice for assessment of damages on 10 January 2013. Under O. 37 r. 1(5) of the Rules of Court 2012, unless otherwise directed, all notices for assessments of damages must be filed within six months from the date of judgment. Prior to the issuance of that notice, the respondent, as the "party entitled to the benefit of the judgment" required under O. 37, to apply to the Registrar for directions:

> Where judgment is given for damages to be assessed and no provision is made by the judgment as to how they are to be assessed, the damages shall, subject to the provisions of this Order, be assessed by the Registrar, and **the party entitled to the benefit of the judgment shall, within one month from the date of the judgment, apply to the Registrar for directions** and the provisions of Order 34 shall, with the necessary modifications, apply. (emphasis added)

[11] At the case management before the SAR, the learned SAR is said to have instructed the parties to file one affidavit each followed by written submissions. The parties were not allowed to call any witnesses to prove damage as the SAR was of the view that the quantum claimed was only for loss of profit. Each party duly filed that one affidavit followed by submissions. On 30 April 2015, the learned SAR assessed the respondent's losses represented in its loss of profits to be a sum of RM1 million.

[12] It was the view of the learned SAR that there was no need for the respondent to prove liability given that judgment had already been entered against the appellant on 1 October 2012. That judgment, though a default judgment by reason of the appellant's non-attendance, is nevertheless a valid and enforceable judgment. That judgment meant that the appellant did

disclose to third parties confidential information and intellectual property belonging to the respondent and, that the appellant had used such information to compete with the respondent's business. Such actions were in breach of the confidentiality and non-competition agreement made between the appellant and the respondent. The wrongful disclosures were specifically to two companies, Landecor Panel Sdn Bhd and 3R Woodtech Sdn Bhd. The appellant is said to have direct interest in the latter company. The learned SAR then issued a certificate of assessment for the sum of RM1 million to be paid by the appellant to the respondent.

[13] The learned judge did not find any appealable error in the decision of the learned SAR. In fact, the High Court did not express any view on the first ground raised here save to say that the use and reliance on affidavits were agreed upon between the parties. The High Court next reminded itself that as a court sitting in appellate capacity, it should be slow to interfere with findings of fact made by the trial judge or the SAR in this case. Unless it can be shown that the SAR proceeded on wrong principles or that the award was wrongly excessive, the award should not be disturbed as the SAR has had the opportunity to see, hear and assess the evidence of the parties during the hearing of the assessment.

[14] We cannot find any fault in that reasoning. That is the same principle that this court, as an appellate court, applies when hearing any and all appeals. The present appeal is no exception.

[15] Dealing with the first ground relating to the use of affidavit evidence, the appellant complained before us that the learned SAR erred in not allowing for the calling of witnesses during the assessment of damages. Had that been permitted, the witnesses would be cross-examined and the truth, established.

[16] In the grounds of decision of the learned judge, it is recorded that both parties had agreed that the assessment is to be by way of affidavit evidence, and even then it was limited to one. In our view, if that was indeed what was agreed, it would be improper for the appellant to renege on its own agreement and now complain. Although O. 37 of the Rules of Court 2012 contain fairly comprehensive provisions on assessment of damages, how it is to be done, the procedure to be followed, and that generally, witnesses do attend before the SAR for the purpose of providing oral and/or documentary evidence, whether or not under pain of subpoena, O. 37 must be read together with O. 34 and 35, and other provisions in the Rules of Court 2012. Orders 34 and 35 respectively provide for pre-trial case managements and proceedings at trial. And so, there were case managements before the SAR. It was at those case managements (as provided under O. 37 r. 1(1)), that the SAR, with the attendance of the parties, gave directions on how the assessment was to be conducted. These directions were accepted by the parties. The appellant cannot now complain.

[17] On the matter of affidavit evidence, while affidavits may be used at trial, they must be done with regard to O. 35 and 41 of the Rules of Court 2012. Where parties rely on affidavit evidence, even if it was just one, it was always open to either of them to apply to cross-examine the deponent in the event there was disbelief and basis for such disbelief in the truth of the contents of the affidavit filed. Otherwise, it would be the responsibility of counsel to lead the court through the affidavit evidence with the aim of either proving the veracity and truth of the contents in relation to the matters pleaded or claimed; or challenging the same. Affidavit evidence may contain admissible hearsay in that the source of the evidence must be disclosed and the deponent must express his belief in its truth. Hearsay remains hearsay. Hence, regardless whether it is from the appellant or respondent, such evidence must always be treated with that caution in mind.

[18] On the second ground, we find ourselves unable to agree with the learned judge. While the court sitting in its appellate capacity may not have had the opportunity to see, hear and assess the evidence of the witnesses, the court to which an appeal is made, is nevertheless required to examine the evidence presented to see if that assessment has indeed been properly and duly carried out. Since the assessment proceeded on the strength of affidavit evidence, then it is to those affidavits and the exhibits produced that the examination is made. The decision of the learned SAR must be examined against all that evidence produced, the pleaded case, and the submissions made; to test if there is proper apprehension of the evidence, whether the correct legal principles have been engaged, and whether there was correct consideration and application of the law to the facts or evidence properly admitted. It would not be enough for the SAR to say that he has seen and heard the evidence, the SAR has to be found to have properly evaluated and assessed the evidence according to both the substantive law of the matter, in this case, the law of contracts, and the law of evidence. Where there is wrong or even no proper and adequate consideration and application of the law to the facts, or where there has been a misapprehension of the law and facts such as to compromise justice, any court is duty bound to intervene. Otherwise, recourse to justice will only remain mere verbiage, hollower than the words used.

[19] From the grounds of judgment of the learned judge, there are no indications that this has been conducted save for setting out the principles for appellate intervention and an expression that the court found that the appellant had "failed to adduce and rebut the documentary evidence in relation to the respondent's losses arising from the appellant's liability. The appellant's affidavit only contains bare denials in respect thereto."

[20] In examining this part of the decision, we find that the learned judge did not properly consider whether the SAR was correct in finding that since the issue of liability to pay was settled by the judgment in default, the respondent was not required to offer proof of loss. All that the court did was to say:

[18] The sole issue to be decided is whether the respondent had proved the damages amounting to RM1,000,000.00 in their counterclaim during the assessment of the damages before the SAR as the issue of liability had been settled by the Judgment in Default which has not been appealed against.

[21] Had the learned judge examined this issue properly, it would have been quite apparent that while the appellant's liability to pay was a non-issue by reason of the interlocutory judgment entered on 1 October 2012, his liability to pay for any damage and any amount reflective of that damage, is still subject to proof. Proof is not a simple matter of amount but a satisfaction of all the other elements of causation, remoteness and, mitigation. Damage or the existence of damage must be proved as a matter of fact; and the amount of that damage must be proved, through oral or documentary evidence, or both. As mentioned earlier, hearsay remains hearsay, whether it was orally presented or through documentary evidence; and it must be disregarded.

[22] In this instance, had the SAR's decision been properly scrutinised, it will become readily obvious that what the SAR had done was effectively to accept and treat the order on liability to pay as good or effective on the issue of the appellant's liability to pay the amount claimed by the respondent. Nowhere in the grounds of the learned SAR's decisions is there any indication of a real evaluation of the evidence, which was all by affidavit and was necessarily documentary, given the directions of the SAR himself. Had that been done, it will be seen that the burden of proving loss was never discharged by the respondent. The burden which remained with the respondent at all times since it was its case to prove on a balance of probabilities, never shifted to the appellant. When the burden is not discharged, there is no question of rebuttal required from the appellant. Had the learned SAR realised the correct position in law and, what was required in terms of evidence, the order for general damages would never have been allowed.

[23] Although the learned SAR had stated that he had taken into account the respondent's loss as reflected in the exhibits, it would appear that the exhibits were not properly scrutinised by the SAR. If at all there was any examination, it was at best, superficial and cursory. Had the learned judge verified the findings of the SAR against the evidence led, the learned judge would have found that those findings are not in the least supported by that evidence. The learned judge would then have exercised her appellate powers and intervened. The High Court necessarily had to do that as the SAR's reasons were too broad brushed and generalised, and not fact specific. As Her Ladyship had failed to do that, we are obliged to intervene and put right the matters that ought to have been righted in the first place. With respect to both the learned SAR and thereby the learned judge, both may have been sidetracked by the reduction of the amount claimed, from around RM18.3 million to RM1 million. We have examined the affidavits and the exhibits

attached and we cannot see how any of the figures mentioned therein represent any loss, be it loss of revenue or loss of profit. We certainly cannot see how any of the figures are tied up with the appellant such as to render the appellant liable to pay the sum claimed by the respondent.

[24] It was the respondent's claim that it had suffered losses and damage to the tune of RM18.3 million as a result of the appellant's breach of the confidentiality and non-competition agreement. The relief, however, is for general damages of RM1 million. The allegations of the appellant's breach are pleaded at paras. 11 to 15 of the defence and counterclaim (see pp. 32 and 33 of the record of appeal):

i. that the appellant had wrongly disclosed the respondent's information to third parties;

ii. that the appellant had wrongly used the respondent's property and intellectual property in order to compete with the respondent and/or to cause the business and interests of the respondent to be uncertain;

iii. that, during his employment with the respondent, the appellant had given unreasonable discounts to certain customers, namely Landecor Panel Sdn Bhd and 3R Woodtech, the latter company being one where the appellant's sibling, Lim Sze Chiuh was a shareholder and director.

[25] The respondent's allegations were repeated in the affidavit of Woo Pek Chuan, a director of the respondent (see pp. 77 to 87 of the record of appeal). In support of his allegations, Woo offered nine exhibits of which exhs. WPC4 to WPC9 pertain to the matter of loss. Exhibit WPC4 is the respondent's comprehensive audited statements of accounts for the financial years of 2011 and 2012; while exh. WPC5 is the respondent's collective yearly sales analysis for the years 2010, 2011 and 2012. The next exhibits of WPC6, WPC7 and WPC8 are the analysis of sales to specific companies of Longland International Co Ltd, Jang Mei Industry Co Ltd, Tai Bong Furniture Sdn Bhd and Metro MDF Co Ltd for various years from 2010 to 2012. Then, there is exh. WPC9 which is a proforma invoice dated 30 November 2011 from Longland International Co Ltd. This invoice was signed by one Patrick Teoh or Teoh Chi Being, a former sales manager of the respondent. Teoh resigned around the time the appellant left the respondent's employment. Teoh subsequently joined Siam Paper Décor.

[26] All these exhibits are said to show a significant drop (penurunan mendadak) in the respondent's revenue from RM95,380,000 in 2010/2011 to RM83,327,000 in 2011/2012; and to RM71,105,710.72 in 2012. These exhibits also show a similar drop in the respondent's sales within a period of two years from the appellant's resignation or cessation of employment with the respondent. The respondent claimed that these significant declines in its financial figures were a direct consequence of the appellant's act of sabotaging the respondent's business.

[27] The respondent further claimed that its customers had informed the respondent that the significant drop in their purchases is because the customers are able to purchase material from an alternative source, especially from Siam Paper Décor, through the appellant. A copy of a proforma invoice dated 30 November 2011 from Longland International Co Ltd, which was signed by Patrick Teoh or Teoh Chi Being and referred to earlier was tendered as evidence. The respondent claimed that both Patrick Teoh and the appellant had disclosed the respondent's customer information to Siam Paper Décor in breach of the confidentiality and non-competition agreement, thereby causing severe losses to the respondent. The learned SAR is said to have evaluated all these pieces of evidence and agreed with the respondent's contention of loss of profits; that there is a loss of profits and that such loss is attributable to the appellant.

[28] With respect, we fail to see how on any principle of evaluation and certainly not on a proper evaluation can those conclusions be drawn. Unless admitted, or unless the claim is for liquidated damages where the judgment entered is a final judgment, the respondent is still obliged to prove its loss. Since the claim of loss here is for general damages (regardless that the respondent had stated in its defence and counterclaim that the sum of RM1 million is claimed as "general damages"), the claim is one for unliquidated damages.

[29] In a claim for compensation aimed primarily at putting a party whose rights have been violated, it is, as far as money can do so, to the same position that such person would have been had his rights been observed – see *Parkson Corporation Sdn Bhd v. Fazaruddin Ibrahim* [2002] 4 CLJ 18; [2002] 1 MLRA 568. In order to succeed in its claim for damages, the respondent must also satisfy the test of remoteness as enunciated in s. 74 of the Contracts Act 1950:

> **Section 74. Compensation for loss or damage caused by breach of contract**
>
> (1) Where a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

[30] Section 74 requires the respondent to prove that it had suffered loss of profits as a result of the appellant's breach of the confidentiality and non-competition agreement. The respondent must prove that this loss of profit arose naturally in the usual course of things from such breach, or which both parties knew at the time of the making of the contract, that such damage or

loss is likely to result from such breach. If this loss is too remote or is an indirect loss, the respondent is not entitled to any compensation, and the court must dismiss the claim, or order nominal damages even if interlocutory judgment has already been entered. There are no free passes to compensation for any claimant, save where there is admission.

[31] Quite aside from this fundamental principle, the respondent is also required to prove that the losses sustained are caused by the appellant. There must be a causal link or nexus between the loss claimed and the act of the appellant. An interlocutory judgment, including one by default, only means that the fact of breach of contract has been established or is dispensed with. The respondent is no longer required to prove liability. What remains to be established and proved is the matter of loss, and the amount of that loss. In *Tan Ah Chio & Ors v. Lua Kim Son & Ors* [2014] 1 LNS 1004, the Court of Appeal had held that:

> It is trite law that a party claiming damages must prove actual losses suffered and that the losses suffered were caused by the opposing party's breach.

[32] The burden of proving this loss of profits always remained with the respondent. Until the respondent has discharged the burden, there is no issue of rebuttal by the appellant. In *Bonham-Carter v. Hyde Park Hotel Ltd* (1948) 65 TLR 177, Lord Goddard stated:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages. It is not enough to write down the particulars and so to speak throw them at the court, saying: 'This is what I have lost. I ask you to give me damages.' They have to prove it.

[33] Similarly, the Federal Court in the decision of *Taiping Poly (M) Sdn Bhd v. Wong Fook Toh & Ors* [2011] 3 CLJ 837 opined:

> The onus is on the plaintiff to prove the loss actually sustained by reason of the defendant's conduct. The plaintiff is entitled to such damages as naturally flowing from their unlawful act, and that there is no artificial limitation in the case of a passing off action.

[34] As this court has indicated earlier, there is no evidence in either the learned SAR's decision or that of the learned judge that these fundamental principles had been duly considered. Where these basic principles have been shown to have been ignored, not applied or applied wrongly, the High Court and now, this court is justified in interfering so as to do justice. This was expressed by the Federal Court in the celebrated decision of *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15:

> We need hardly add that in considering this appeal, and in particular, the grounds upon which an appellate Court would be justified in interfering by reassessment of the damages, we have reminded ourselves of what Greer LJ had said in *Flint v. Lovell* [1935] KB 354 CA (at p 360). "This Court", he said:

> … will be disinclined to reverse the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make, it in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

[35] Applying those principles to the assessment that was conducted here, we find that there was actually no consideration of these principles at all. The learned judge, certainly did not ask the right questions, whether the principles of compensation for a breach of contract have been properly applied by the learned SAR. Even though the SAR had said that the loss as seen in the several exhibits before the court were clearly caused by the appellant, the learned judge must examine that evidence with a view to satisfying herself that there was indeed proper assessment conducted. Where the learned judge fails to do that, and that is the case in the present appeal, we must intervene to prevent injustice.

[36] When we examine the pieces of evidence presented by the respondent, we found that they do not, in fact, support its claim; regardless whether that evidence is taken on its own or collectively. Consequently, the respondent cannot be said to have proved its loss and is therefore, not entitled to any compensation, including a claim for loss of profits.

[37] The respondent's claim relied on the nine exhibits to establish what its counsel described as "severe loss of profits". First and foremost, the respondent's audited statements of accounts in exh. WPC4. The respondent claimed that these were comprehensive statements. They are not. While these statements may have been audited, what was tendered were not the comprehensive sets of accounts. For instance, the notes which contained explanations and clarifications to various entries were not available for examination. That omission meant that the evidence was incomplete rendering it unsafe and unreliable.

[38] Next, there is no evidence that the respondent always enjoyed an increase in either its revenue or its profits or that its revenue was consistently of a certain sum; that but for the appellant's acts, this trend would have continued. What the respondent offered instead as evidence of its loss is this purported drop in its annual revenue in years 2011 and 2012. We do not find this as sufficient to even establish the existence of a right to any loss of profits. While there may have been a drop of revenue from RM95,380,000 for the period of 1 May 2010 to 30 April 2011 to RM83,327,000 for the year 2012 (see p. 257 of record of appeal), the statements in fact show that there

was already a drop in the previous period of 1 January 2009 to 30 April 2010, from the sum of RM126,934,000 to RM95,380,000 (see p. 250). The evidence shows that the respondent was already experiencing a reduction in revenue collection prior to the period complained of; a sum of RM31,554,000 as compared to the reduction of RM12,053,000. In terms of percentage loss, the loss for that earlier period is even more substantial and significant than that experienced for the period under scrutiny.

[39] Revenue also does not necessarily translate into profits. It depends on a whole host of other factors such as operating expenses, investments, borrowings and many more, as we shall soon see. A drop in revenue, to use the respondent's terminology, does not mean a corresponding loss in profits. And, that is precisely what has happened here. In the audited statements of accounts, for the same period complained of, the respondent in fact, experienced an increase in its operating profit; from RM12,957,000 for the previous period to RM13,181,000,00 for the period under review. Its profits after taxation also rose from RM9,375,000 to RM9,483,000 – see p. 250. As for the subsequent period to 2012 (see p. 257), while there may be a decline in the profit after tax (to a sum of RM4,653,000), the respondent actually invested in substantial purchase of property, plant and equipment – see p. 260 where a sum of RM13,685,000 was spent. Taking into account advances from the respondent's holding company and related companies, the respondent nevertheless had a substantial increase in its cash flow for that year.

[40] Further along in the audited statements, one can also find that even taking a decline in the revenue as alleged, the respondent was, in fact, experiencing an increase in its retained profits. Its retained profits rose from RM37,324,000 in 2010 (30 April 2010) to RM46,917,000 (30 April 2011) – see p. 249. At p. 256, for the year 2011, the respondent's retained profits was RM29,282,000 and this sum rose to RM33,935,000 for the year 2012. This alone shows that the respondent's claim of a loss of profits is clearly unsustainable. This telling piece of evidence was brought up by the appellant but it was not considered at all by the learned SAR. Had that been done, the SAR would have found that the claim had no basis; and this was not considered by the learned judge.

[41] Even accepting that the drop in revenue is significant, which we do not find to be the case, we also cannot see any evidence presented before the learned SAR to attribute this drop, in any way, to the appellant. There is no evidence that the appellant was its sole or main sales personnel having sole or substantial charge of the sales such that any loss may be attributable to him and no other. The SAR attributed the significant losses shown in exhs. WPC6, WPC7 and WPC8 as clearly due to the appellant's use of the respondent's confidential information and "trade secrets", that the appellant had disclosed confidential information on the respondent's customers to Siam Paper Décor.

[42] On the contrary, the respondent itself had alluded to the existence of another of its employees, a certain Patrick Teoh, its sales manager who is said to have left around the same time as the appellant. That Patrick Teoh is said to have signed a proforma invoice for one of the sales. With the involvement of this Patrick Teoh, and with no explanation forthcoming from the respondent, it is not possible to attribute any of the respondent's losses to the appellant. In the case of Siam Paper Décor, the evidence seems to point to this Patrick Teoh, and not the appellant; as the person responsible for these sales and payments. It is, therefore, baffling how the orders and any consequential loss could be tied up to the appellant.

[43] Added to this is the respondent's claim of RM1 million out of RM18.3 million loss of revenue (treated as loss of profits), without any reason or explanation whatsoever. All this makes the respondent's claim unsupported and thereby, unreliable.

[44] As far as the sales figures are concerned, the respondent relies on them as evidence of a "significant drop in sales within two years upon the plaintiff's resignation from the respondent/defendant's company which saw a decline from RM96,558,983.33 in 2010 to RM88,570,334.86 in 2011 and reduced thereafter to RM71,105,710.72 in 2012 respectively. The respondent claimed that there was an average loss of RM25.4 million for the two years that the appellant was obliged to adhere to obligations of confidentiality under the confidentiality and non-competition agreement. This significant drop in sales is a direct consequence of the appellant/plaintiff's act of sabotaging the respondent/defendant's business (refer to exh. "WPC5" at pp. 146-155 core bundle)."

[45] When these sales figures are properly examined, they too, do not support the respondent's claim. The respondent was merely looking at the overall total figures. Again, that in itself is no indication and certainly not necessarily attributable to the appellant's cessation of employment. Looking at the sales figures for any one customer, it is apparent that there were reductions as well as increases in sales from month to month. These patterns were no different for the same corresponding periods in the preceding year. For instance, the sales figures for the first customer on the list, Borgs Manufacturing Pty Ltd. The sales figures for the month of January for the three years under consideration, show that contrary to the respondent's claim, there is actually an increase in sales:

2010 - RM1,183,413.48

2011 - RM1,064,899.12

2012 - RM1,672,470.97

[46] The respondent further cited several customers who were handled by the appellant; namely Longland International Co Ltd, Jang Mei Industry Co Ltd, Tai Bong Furniture Sdn Bhd, Metro MDF Co Ltd and Landecor Panel Sdn Bhd. The sales from these customers are said to have fallen after the appellant left the employment of the respondent. The respondent claimed that its profit margin is 20% of the yearly sales, giving the respondent about RM18.3 million in loss of profits. But, it has decided to confine itself to RM1 million. No explanation was given for this decision. On examination, we further found that while there was a decline in sales, there was also an increase. For instance, in the case of Longland International, the sales were RM5,848,526.89 for 2010, RM4,836,566.12 for 2011 but this rose to RM5,232,022.20 for 2012. While the numbers may show a slight decrease between years 2010 and 2012, it does not count for anything but a fluctuation of sales.

[47] Given the state of the audited statements and the unreliable yearly sales analysis, it is difficult to see how there is any loss of profits. Damages is never arbitrary and it is not for the respondent to say that "my loss is RM18.3 million but I am only seeking RM1 million from you, period", and that the court functions just to give voice to that. The learned SAR must be properly satisfied according to firmly established principles of compensation and based on reliable evidence. Since the respondent had chosen to rely on the affidavit of Woo who in turn relied on the several exhibits, the SAR was required to scrutinise such evidence to see if the claim of damage is indeed proved. From what we can see, there was no such examination by the learned SAR. If there had been one, it would have been readily apparent that the respondent's claim is not at all supported by the documents relied upon. Under such circumstances, and with evidence provided by the respondent themselves, it is furthermore unreasonable and wrong to lay any blame at the appellant's feet. This failure on the part of the learned SAR was not appreciated by the learned judge. It is this failure that warrants this court's intervention.

[48] In the recent decision of the Federal Court in *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177, Zainun Ali FCJ expressed the following view on the calculation for loss of profits:

> [118] However, we do not approve of the appellant's method of calculation for the loss of profits. In its pleadings, the appellant claimed for over RM19m whilst in its written submissions the appellant claimed RM10,415,421.43 (and, incidentally, incorrectly added the word million behind the figure). Let it be said that such careless disregard for precision is less than satisfactory. Counsel for the appellant stated that "this sum (and the formula used in arriving at that figure) was explained and had been proved at trial. Essentially, it is based on the average of the commissions due to the appellant for the preceding 40 months which is then multiplied with the balance [of] 20 months. The accuracy of these figures was not challenged during trial. (para 54 of the appellant's written submissions).

[119] This calculation does not reflect the principles of compensation for loss of profits and will put the appellant in a position well beyond that which it would rightfully be in, had the contract been properly performed. A calculation based on "commissions", that is to say receipts, is very different from a calculation based on "profits". To award damages based on commissions would completely disregard the fact that had the contract been properly performed the appellant would have had to incur expenses and costs of operation, among other things. The proper sum should therefore be net of all expenses that would be reasonably incurred in the remaining 20 month period. To do otherwise would give the appellant more than they would have obtained had the contract been performed, and therefore more than what they rightfully deserved. However, contrary to the respondent's submission and the judgment of the trial judge, the mere fact that the formula was the appellant's own formulation (presumably in contradistinction with a formula provided for within the contract) is not a ground for rejecting the formula. The agreement did not stipulate a formula for calculating loss of profits, and as such the general principles of the common law will apply and a formula that best estimates the future loss of profits will be preferred by the Court.

[120] Therefore, contrary to the respondent's submissions, we do not think that proper consideration on quantum was allowed for at trial. There were no clear submissions made as to the expenses incurred and a very loose use of the words pendapatan and kutipan, which shed no light on the actual loss of profits. The respondent should also take the opportunity to submit on whether the formula is a proper representation of the loss of profits, that is to say whether or not there are any other factors that could reasonably have been expected to increase or reduce the collections, and corresponding commissions, be it a significant reduction in remaining arrears or for any other reason. The challenge by the respondent exclusively on the basis that loss of profits was not expressly stated in cl. 8.5 was wholly inadequate.

[49] Similarly, we find that there was no proper consideration of the compensation claimed. There were so many real and serious discrepancies that were not clarified and explained away by the learned SAR in the terms discussed. Assessment of damages is a critical stage in the evaluation of any claim before the court. Inasmuch as the primary question of liability warrants careful consideration of the law and proper application of that law to the facts, so is the assessment of damages. Such exercise can sometimes be tedious as a mountain of "information" is thrown at the court as purported evidence and justification for the claim. That is quite wrong. Parties must carefully prove their claim, and the court must evaluate the contentions, consider if the evidence brought is indeed relevant, true and supportive of the claim, no matter how difficult or cumbersome. It is not enough for a court, especially one sitting at first instance, to simply say that it is satisfied that the claim is proved or not proved. Reasons must be articulated to explain why various pieces of evidence were either considered or not considered; and

why and how the submissions from both counsel on the same were treated. On appeal, the High Court must evaluate that decision to see if it is borne out by the record.

[50] None of this was conducted here. We have had to conduct that exercise here and we have found the decision of the learned judge wanting. All this has led to an erroneous estimation of the respondent's claim for general damages in the form of loss of profits. This misdirection resulted in a failure of justice which was not addressed by the learned judge; and which we must now put right.

[51] For all the reasons adumbrated, this appeal is allowed and the order of the learned judge is hereby set aside. We further order the respondent to pay the appellant costs of RM15,000 here and below subject to payment of allocator fee. The deposit is refunded.